IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 757 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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STATE OF GUJARAT

Versus

SARDARKHAN NADIRKHAN PATHAN

Appearance:

1. Criminal Appeal No. 757 of 1992

Mr.K.P.Raval,learned Addl.P.P. for appellants No. 1

MR MUKUL SINHA for Respondent No. 1-2

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 01/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE D.K.TRIVEDI)

1. Appellant - State has challenged the order of acquittal recorded by the learned Addl. City Sessions Judge, Ahmedabad dated 17.6.92 in Sessions Case No.428/88 wherein the learned trial Judge has acquitted both the accused from the offences punishable under Sections 28-B and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein after referred to as 'the NDPS Act') and under Sections 66(1)(b) and 81 of the Bombay Prohibition Act, 1949.

2. Mr. Raval, learned Addl. P.P. while arguing the matter has taken us through the paper book consisting of oral as well as documentary evidence and the judgment under challenge. It is the submission of Mr. Raval that the respondents - accused were found when the raiding party had raided the place,namely, Room No.2 of Vina Guest House on 24.2.1987 in presence of Panchas as well as absconding accused and during search from the Bagal Thela from the possession of the accused, 2 Kg. of charas was found and though the prosecution has established the case against the respondents, the learned trial Judge has acquitted the accused, which resulted into miscarriage of justice. It is the submission of Mr.Raval that when P.S.I. Chaudhari was in the Police Station and during interrogation of one accused,who was involved in a prohibition case, he disclosed that he has purchased the charas from Mohammed Saiyed Gulamrasul, who stays at Vina Guest House in Room No.2,situated at Revdi Bazar,Ahmedabad. After receiving the information and after arranging the panch witnesses, alongwith officers of the raiding party, they had reached at the place, namely, at Vina Guest House, wherein the room was found closed and when it was opened, three accused were found in the said room and they disclosed their names and addresses and from the Bagal Thela, narcotic substance was found in presence of panchas. Thereafter,the panchanama was recorded and thereafter when the said substance was sent for analysis in Forensic Science Laboratory, it was found to be charas, being a narcotic drug. He accordingly submitted that the learned trial

Judge was not right in acquitting accused.

3. Mr. Mukul Sinha appearing for the respondents has supported the judgment and order of acquittal and according to him the order of acquittal is passed by the learned trial Judge based on evidence and in view of the catena of decisions in respect of how to examine the order of acquittal, he submitted that this is not a matter where the order passed by the learned trial Judge acquitting the accused deserves to be set aside by convicting the accused and prayed for dismissal of the Appeal. He has also placed reliance upon the decision of the Apex court in the matter of Abdul Rashid Ibrahim Mansuri v.State of Gujarat, reported in 2000 AIR SCW 375 in respect of the mandatory requirement of the provisions of the NDPS Act,namely,Section 42 of the NDPS Act.

4. As found from the record that as per the information received during interrogation of one accused, namely,Kanaksinh,who was arrested in a prohibition case, he disclosed that the charas, which was found from him, was purchased from absconding accused,who was at the relevant time staying in Vina Guest House in Room No.2 in Revdi Bazar,Ahmedabad. Immediately on getting information by Shri Chaudhari,who was attached to Gaikwad Haveli Police Station, he immediately made arrangement to call the Panchas and after the Panchas were arrived, he explained to them the substance of the information received by him and thereafter he called Shri Jhala, Shri Jadeja, Shri Pratapbhai and others and proceeded towards Vina Guest House. When they came up to Room No.2 of the said Guest house,the said room was closed and the said room was got opened and one man, wearing a half T-shirt, gave his name as Mohammed Saiyed Gulamrasul, resident of Bijalyas, District Anantnag. The other person found there in the room was Sardarkhan Nadirkhan Pathan,who was residing at Jafri Manzil, Salapose Road, Ahmedabad and the third person, who declared his name as Natverlal Somnath Patel, was residing at Moti Hamam,House No.509, Ahmedabad. In the presence of accused as well as the Panch witnesses and other members of the raiding party,the room was searched and below the cot, there was a suit case and a bag (Bagal Thela). On opening the Bagal Thela, one plastic bag was found and on opening the same, 9 lumps of charas were found and a string was tied round the plastic bag and thereafter the said plastic bag was wrapped in a newspaper and thereafter it was tied with a string and slips bearing the signature of Panchas and of the P.S.I.and seal of the Police Inspector, Gaikwad Haveli Police Station was affixed on the same. A personal search of the accused were taken and nothing was

found from their possession in the form of narcotic substance. However, some cash amount was found.

5. It is also found from the record that though the charge-sheet was filed against three accused,out of which accused No.1 Mohammed Saiyed Gulamrasul was absconding. Accordingly the learned trial Judge has, while passing the order below the charge-sheet, separated the trial of the absconding accused and the learned trial Judge has framed charge against the present respondents.

6. Shri Chaudhari,P.S.I., after carrying out the search and after seizing the muddamal narcotic substance, has recorded the F.I.R., which is at Exh.17. Reading Exh.17 it is found that one accused was arrested in a prohibition case, bearing C.R.No.39/87 under Sections 66(b), 65(a) and under Section 20-B of the NDPS Act and after his arrest and during interrogation it was found that he was from Vadnapur,Taluka Bhiloda, District Sabarkantha, who was arrested by the police at 14 hours on 24.2.87. When he was interrogated and inquired about the possession of charas, which was found,he had stated that he has purchased the said charas from a person named Mohammed Saiyed Gulamrasul of Kashmir, who is staying in Vina Guest House,Room No.2. It is further found from the F.I.R. that thereafter, the P.S.I. had called Panchas and also by arranging the members of the police party, they proceeded towards Vina Guest House for raid. As found from the F.I.R., Police Superintendent, "B " Division alongwith other staff had proceeded to Vina Guest House. The F.I.R. further discloses about the persons, who were found in the Room. They disclosed their names and addresses and after opening the Bagal Thela, 9 balls were found and after weighing such substance, it was found that it was weighing 2 Kg. and value of the said substance was assessed at Rs.6000/-- and in presence of Panchas the samples were prepared and the Panchas have put their signature on the slip and the said samples were seized and, thereafter, necessary steps were taken by the Police Officer.

7. As found from the evidence of Shri Chaudhari P.W.1 he has deposed that he had received the information through interrogation of the accused Kanaksinh, who was arrested by the Police for the offence under the Prohibition Act as well as for the offence under the NDPS Act and said Kanaksinh had informed that substance, namely, Charas, which was found from him, was purchased by him from Mohammed Saiyed Gulamrasul who was staying at Vina Guest House in Room No.2 and the information, which was received by Shri Chaudhari was conveyed to his

superior officer, namely, to Shri Jhala, S.P. As found from his evidence that Shri Jhala and other Police persons alongwith him had proceeded with Panchas to carry out raid. He has admitted in cross-examination that he has not recorded anything in respect of the information given by accused Kanaksinh during his interrogation as the case against Kanaksinh was in progress and he was not investigating the said case. He has further admitted that the information, which Kanaksinh had given was not recorded in the station diary and while giving explanation he has deposed that such information must be in the case papers pertaining to the investigation of accused Kanaksinh. It is further found in the cross-examination wherein Shri Chaudhari has in term admitted that he has no knowledge that accused No.2 is running a taxi business and he is helping his father by taking the passengers. He denied the suggestion that accused No.2 had gone at Room No.2 of Vina Guest House for the business of his father and when he was entering into the room, at that time he has effected arrest and the doors of room No.2 were found open. He has denied the suggestion that the information given by Kanaksinh was not conveyed to his superior officer. However, he has admitted that he has not noted down the said information by informing the same to the superior officer and further admitted that while making arrest of the accused and seizing the material from the accused, he has not intimated the same to his superior officer and the accused were not intimated for what offence they were arrested. In cross-examination Shri Chaudhari has admitted that when they went to Vina Guest House, he came to know that accused No.3, namely, Natverlal Somnath Patel - respondent No.2 herein is working as a Manager in the said Guest House and he has not made any inquiry about the persons working in the Guest House. Shri Chaudhari has also denied the suggestion that at the time when the raid was carried out Shri Jhala was not present.

8. While going through the evidence of Police Officers as well as Panch witnesses and as found from the evidence of two Panchas examined by the prosecution, they have not supported the case of the prosecution and both Panchas were treated as hostile and at the request of the Public Prosecutor both Panchas were cross-examined by the Public Prosecutor. P.W.2 Narendrakumar was at the relevant time attached to Shaher Kotada Police Station as P.S.I. and on 25.2.87 at 22 hours Shri Chaudhari from Gaikwad Haveli Police Station had come with the FIR and other papers and on the strength of such papers he made entry in the station diary and registered the offence. We have perused the entry which is at Exh.22. As found

from the said entry Exh.22, there is a reference of arrest of accused Kanaksinh as charas was found from him. P.W.2 Narendrakumar had issued muddamal Pavti, which is also on the record at Exh.23. The muddamal in question was handed over to Shri Vaghela, which was found in sealed condition.

9. P.W.4 Pravinsinh has deposed that when he was on duty at Shaher Kotada Police Station as P.S.I., he has received the papers from P.S.O. for further investigation. During investigation he has sent the muddamal in favour of F.S.L. On the next day, he produced the accused before the learned Metropolitan Magistrate. In cross - examination he deposed that though papers were handed over to him, there was no papers to show that the information was conveyed to the superior officer and further that he has not checked the Bagal Thela. He has not informed about the incident to his superior officer Shri Jhala and during the search of the house of accused No.2 nothing was found. It is further found from the cross examination that he was not there as a member of the raiding party.He has also taken entry from the register of Vina Guest House being entry No.1306. He came to know that the absconding accused was staying at Vina Guest House. He has no knowledge that Mohammed Saiyed - the absconding accused had come to Vina Guest House on 23.2.87. He has also received the statement of Kanaksinh recorded by Shri Chaudhari, which was registered at Gaikwad Haveli Police Station as Prohibition C.R.No.39/87. He has not gone to Room No.2 of the said Guest House. He has denied the suggestion that it is not correct to say that he has gone to hand over the muddamal in favour of F.S.L. However, as found from the evidence in chief, witness has in term stated that he has gone to FSL for handing over the muddamal.

10. As observed earlier, both the Panchas have not supported the prosecution and they have turned hostile. The F.S.L. report Exh.28 shows that as per the opinion of F.S.L. all the 9 exhibits contained charas and the report further indicated that on chemical examination, nine blackish brown colour balls were found to be charas.

11. We are not referring to the evidence of P.W.5 Navinchandra and the evidence of P.W.6 Rajubhai in detail as they have not supported the prosecution.

12. The learned trial Judge had in term after appreciating the evidence of the prosecution witnesses held that the prosecution has failed to establish that the accused were in conscious possession of narcotic

substance, namely, 2 Kgs. of charas. The learned trial Judge had rightly observed that the evidence of the panch witnesses was not supporting the prosecution as they have turned hostile. The learned trial Judge has while considering the evidence of Shri Chaudhari P.W.1 in term held that he has not noted down in the station diary the information, which he received from interrogation of Kanaksinh, who was arrested in a prohibition case, which was registered under different C.R. nor he has made any report in writing to his superior officer immediately after the seizure of muddamal. As found from evidence of P.W.1 Shri Chaudhari that no report in writing was made to his superior officer immediately after the seizure of the muddamal and further that no entry is made in the station diary. The prosecution has not examined Shri Jhala, Superintendent of Police. It is the case of the accused No.2 that while working as Manager in the said Guest House he had gone to Room No.2 to inquire that whether absconding accused Mohammed Saiyed Gulamrasul is vacating the said room or not in the evening and at that time he was arrested. No evidence is led by the prosecution that the substance, which was found from the Bagal Thela,is of respondents and as per the prosecution case that as per the interrogation of accused Kanaksinh, he had disclosed during interrogation that he had purchased the charas from Mohammed Saiyed Gulamrasul. In our view the prosecution has failed to establish the case against the accused - present respondents and the finding given by the learned trial Judge acquitting the accused is based on evidence. Even on re-appreciating the said evidence, it is difficult for us to accept the contention of Mr. Raval that the substance was found from the possession of accused,namely, respondents herein. As found from the evidence of Shri Chaudhari, we are of the opinion that while taking search there is violation of the provisions of Section 42(2) of the NDPS Act as admitted by Shri Chaudhari that no entry nor any report was made to the superior officer after the seizure of the muddamal as well as after the arrest of the accused. In our view and considering various decisions of Apex court on the point of examining the acquittal appeal, even after re-appreciating the entire evidence, there is nothing to suggest that the prosecution has established the case against the respondents herein and this is not a case where the order of acquittal recorded by the learned trial Judge is required to be interfered with.

13. Accordingly Appeal is dismissed. The order of acquittal dated 17.6.92 passed by the learned trial Judge in Sessions Case No.428/88 acquitting the accused for the offences punishable under Sections 20(b)(ii) and 29 of

the NDPS Act and under Sections 66(1)(b) and 81 of the Bombay Prohibition Act is confirmed. Bail bonds of the accused are ordered to be cancelled.

(D.K.Trivedi,J)

(H.H.Mehta,J)

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